

The Official Website of the Department of Revenue (DOR)

Mass.Gov Home

State Agencies

State Online Services

DOR Home

For Individuals and Families

For Businesses

For Local Officials

For Tax Professionals

Home > Businesses > Help & Resources > Legal Library > Directives > Directives - By Decade > (2000-2009) Directives >

Directive 02-1: Liability Under the Responsible Persons Statute, G.L. c. 62C, s. 31A

Introduction

General Laws c. 62C, Â§ 31A ("Responsible Persons statute") requires that a person who fails to pay over certain taxes of a corporation or partnership ("Taxpayer") to the Commissioner is personally and individually liable for the tax owed. This Directive clarifies that the scope of this responsibility under the statute may extend to persons or entities irrespective of their relationship to the Taxpayer if such person or entity has exerted control over decision making concerning the payment of certain taxes, has instructed Taxpayer personnel to disregard existing procedures which would assure the payment of certain taxes, or has taken action which otherwise hinders, delays, or prevents the Taxpayer from paying such taxes.

Issue

Can a person (whether an individual or an entity) or an entity which is not in the employ of a Taxpayer, or is not otherwise affiliated with the Taxpayer, be personally and individually liable for payment of a required tax under the Responsible Persons statute, G.L. c. 62C, Â§ 31A?

Directive

Any person who fails to pay certain taxes (wage withholding of personal income taxes, the rooms occupancy excise, and sales or use taxes) is personally and individually liable therefor if such person had a duty to pay the tax. See G.L. c. 62C, Â§ 31A (and statutory provisions cross-referenced therein). This obligation exists notwithstanding any relationship the person had or did not have with the Taxpayer.

Whether a party is liable under the Responsible Persons statute is a question of fact. In addition to the general rules for determining who is under a duty to pay over taxes found at 830 CMR 62C.31A.1 ("Responsible Persons regulation"), the Commissioner considers multiple factors including, among others:

(i) the relationship of the party to the Taxpayer;

(ii) the exercise by the party of control over the Taxpayer's affairs;

(iii) the exercise by the party of control over disbursement of the Taxpayer's funds; and

(iv) the capacity of the party to prevent the tax liability from accruing.

Discussion

Massachusetts law provides that certain persons may be personally and individually liable for the payment of certain taxes owed by a corporation or partnership. G.L. c. 62C, Â§ 31A. There are four statutory provisions that specify who may be such a "person," found at G.L. c. 62B Â§ 5 (definition of

SEARCH

Select an area to search

Search

file:///W|/...for%20Administration%20and%20Finance/Dept.%20of%20Revenue/DOR%20Directives/ocm18213690-02-1.htm[8/24/2010 11:44:17 AM]

"employer"), G.L. c. 64G, Â§ 7B (definition of hotel "operator"), G.L. c. 64H, Â§ 16 (definition of "person" for sales tax collection responsibilities), and G.L. c. 64I, Â§ 17 (definition of "person" for use tax collection responsibilities). Each of these provisions referencing such persons is preceded by the word "includes."

A person liable under the Responsible Persons regulation is any person with an obligation to remit taxes that arises from a person's position, function, or responsibility undertaken on behalf of a corporation or partnership. 830 CMR 62C.31A.1(2), definition of "duty to pay over taxes."[\(1\)](#)

Massachusetts looks to the established body of federal jurisprudence for guidance in formulating its standards under the Responsible Persons statute due to the close resemblance between the Massachusetts and the federal laws dealing with this issue. *Commissioner of Revenue v. Brown*, 424 Mass. 42, 44 (1997). Federal law holds that the responsible person statutes can extend to certain parties not employed by a Taxpayer. See *Commonwealth National Bank of Dallas v. U.S.*, 665 F.2d 743 (5th Cir. 1982)(holding that a third party lending bank and an officer thereof were liable as responsible persons for failing to honor checks written to pay wage withholding taxes, while honoring other checks written by the same taxpayer). The use of the term "includes" in the definition of the term "person" indicates that liability under the responsible person statute is not restricted to the classes of persons specifically listed. *Id.*, at 750. The term "includes" in the definition illustrates the scope of the term but does not exclude others. *Id.* A "person" may include a corporation or an individual or corporation unaffiliated with the Taxpayer. *Id.*, at 755.

The Responsible Persons statute was designed to cut through the shield of organizational form and impose liability upon those actually responsible for a corporation's failure to pay over certain taxes. *Cole v. Commissioner of Revenue*, A.T.B. no. F235571 (Jan. 31, 2000), at 4, *quoting Gadoury v. U.S.*, 77 F.3d 460 (1st Cir. 1996). The test of whether a person can be held responsible for payment of the subject taxes is whether the person is responsible for controlling disbursements of the taxpayer, and reaches those who have the authority to decide which bills are to be paid, and when. See *Commonwealth National Bank of Dallas v. U.S.*, 665 F.2d 743, 751 (5th Cir. 1982). Therefore, a person who meets the criteria found at G.L. c. 62C, Â§ 31A, 830 CMR 62C.31A.1 and in this Directive, is a person liable thereunder even if that person is not employed by a taxpayer. This may include a person or entity unaffiliated with the Taxpayer, which substantially controls the flow of Taxpayer's funds that are used to pay taxes of the Taxpayer, even if there were an agreement between the Taxpayer and a third party that nominally called for the Taxpayer to file the return and disburse the tax payment.

The Department cautions parties that receive (even temporarily) possession, custody, or control of certain taxes (wage withholding, sales and use taxes, rooms occupancy excise) from a Taxpayer that is obligated to pay such taxes, to segregate these funds from other funds received from the Taxpayer. Such parties may in no circumstance withhold these funds from payment to the taxing authority. This legal obligation exists notwithstanding any agreement to the contrary between a Taxpayer and a third party. Cf. G.L. c. 62B, Â§ 5, G.L. c. 64G, Â§ 7B, G.L. c. 64H, Â§ 16, G.L. c. 64I, Â§ 17.

Example:

Retailer is a corporation that sells merchandise in retail stores. Finance is a private lender to whom Retailer turns for working capital after being turned down by institutional lenders. Finance and Retailer enter into an agreement under which Finance agrees to extend Retailer a revolving line of credit on terms substantially dictated by Finance. Retailer is required to send one hundred percent of its daily receipts to various lock-box accounts controlled by Finance. Included in these daily transfers of Retailer's receipts are the proceeds of the sales taxes paid to Retailer by its customers. Retailer writes checks to pay its financial obligations from the sales proceeds routed to Finance. Finance regularly reviews Retailer's planned disbursements, including payments of sales tax to the Department, prior to authorizing disbursements from the Retailer's bank account.

After approximately one year of operating its stores under this agreement, Retailer's monthly receipts began to drop significantly, leaving it with insufficient cash to pay its current obligations. Retailer has several pressing financial obligations. Among these obligations is an overdue balance owed to Wholesaler from whom Retailer regularly makes purchases to replenish its inventory. Wholesaler refuses to replenish Retailer's stock until it receives payment in full for several months' shipments. Retailer also has its monthly obligation to pay over sales taxes collected in the prior month.

Recognizing that Retailer may be on the verge of bankruptcy and has exceeded its borrowing capacity under its line of credit, Finance begins a closer review of all disbursements planned by

Retailer. From the funds of Retailer that it holds, Finance permits Retailer to pay its obligation to Wholesaler. However, Finance denies Retailer's request for the release of funds to pay over the sales taxes, withheld for the prior month, to the Department of Revenue, even though Finance has regularly permitted such requests in prior months. Finance also declines to issue a short-term advance to satisfy the obligations to the Department of Revenue, although Finance continues for an additional three months to issue advances to satisfy obligations to pay Retailer's employees and those trade creditors that are thought by Finance to be essential to Retailer's operations. Retailer ultimately files a Chapter 7 bankruptcy petition, owing to the Department four months of collected sales taxes.

Among others within the Retailer entity who may be persons liable under the Responsible Persons statute, Finance, or individuals responsible for directing the conduct of Finance, may be deemed persons liable under these facts. Finance has exercised its control generally over Retailer's affairs, and specifically over the disbursement of Retailer's funds relative to which bills will and will not be paid.

Although this Directive is a clarification of various statutes, e.g., G.L. c. 62B, Â§ 5, G.L. c. 64G, Â§ 7B, G.L. c. 64H, Â§ 16, G.L. c. 64I, Â§ 17, of who can be a person liable under G.L. c. 62C, Â§ 31A, this Directive will be applied prospectively.

/s/ Sheila T. LeBlanc  
Sheila T. LeBlanc,  
Senior Deputy Commissioner of Revenue

STL:DMS:dt

January 24, 2002

DD 02-1

[ [Return to Online Legal Library](#) ]

Footnotes:

1. This Directive does not attempt to define what constitutes a "duty to pay over taxes." ([return to text](#))